IN THE SUPREME COURT OF MISSOURI

Case No. SC86181

DONNA SNIDER, ASSESSOR FOR PEMISCOT COUNTY, et al.

Appellants,

v.

CASINO AZTAR, et al.,

Respondents.

Appeal from the Circuit Court of Pemiscot County
Case No. 01CV752808
Honorable Fred W. Copeland

SUBSTITUTE REPLY BRIEF OF APPELLANTS
Donna Snider, Assessor of Pemiscot County & Pemiscot County, Missouri

---

BLITZ, BARDGETT & DEUTSCH, L.C.

Thomas W. Rynard, #34562
308 East High Street
Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358

SOKOLOFF & SPIELMAN

Stephen P. Sokoloff , #28203
P.O. Box 721
Kennett, Missouri 63857
Telephone No.: (573) 888-6610
Facsimile No.: (573) 888-6677

Attorneys for Appellants Donna Snider, Assessor of Pemiscot County and Pemiscot County

TABLE OF CONTENTS

Table of Cases and Authorities

POINTS RELIED ON

I.

(Responds to Point I of Brief of Respondents)

THE TRUE ISSUE IN THIS CASE IS WHETHER CASINO PROPERTIES CAN BE VALUED AT THEIR NEXT MOST PROFITABLE HIGHEST AND BEST USE, WHILE ALL OTHER COMMERCIAL REAL PROPERTY IS VALUED AT ITS HIGHEST AND BEST USE. FOR TAX ASSESSMENT PURPOSES ALL COMMERCIAL REAL PROPERTY SHOULD BE VALUED ACCORDING TO ITS HIGHEST AND BEST USE.

City of St. Louis v. Union Quarry & Construction Co., 394 S.W.2d 300 (Mo. 1965)

St. Joe Mineral Corp. v. State Tax Commission, 854 S.W.2d 526 (Mo. Ct. App. 1993)

II.

(Responds to Point II of Brief of Respondents)

THE STATE TAX COMMISSION DOES NOT HAVE UNFETTERED DISCRETION IN MATTERS RELATED TO PROPERTY TAXATION AND VALUATION. IT IS BOUND TO CORRECTLY APPLY THE ACCEPTED METHODS OF VALUATION AND MUST EXERCISE ITS EXPERTISE IN ITS REVIEW OF APPEALS.

Mo. Const. Art. X, § 14

Hermel v. State Tax Commission, 564 S.W.2d 888 (Mo. banc 1978)

St. Louis County v. State Tax Commission, 515 S.W.2d 446 (Mo. 1974)

State ex rel. Cassily v. Riney, 576 S.W.2d 325 (Mo. banc 1979)

III.

(Responds to Point III of Brief of Respondents)

IN VALUING CASINOS AT THEIR NEXT MOST PROFITABLE HIGHEST AND BEST USE WHILE VALUING ALL OTHER COMMERCIAL REAL PROPERTIES AT THEIR HIGHEST AND BEST USE, THE STATE TAX COMMISSION HAS CREATED A SUB-CLASSIFICATION OF COMMERICAL REAL PROPERTY IN VIOLATION OF ARTICLE X, SECTION 4(B). ITS ACTION GOES BEYOND APPLYING DIFFERENT FACTORS TO PROPERTIES WHICH ARE DIFFERENT IN NATURE IN THE APPLICATION OF ANY OF THE RECOGNIZED APPROACHES TO VALUATION.

MO. CONST. Art. III, § 4(b)

Drey v. State Tax Commission, 345 S.W.2d 236 (Mo. 1961)

O'Flaherty v. State Tax Commission, 698 S.W.2d 2 (Mo. banc 1985)

ARGUMENT

I.

(Responds to Point I of Brief of Respondents)

THE TRUE ISSUE IN THIS CASE IS WHETHER CASINO PROPERTIES CAN BE VALUED AT THEIR NEXT MOST PROFITABLE HIGHEST AND BEST USE, WHILE ALL OTHER COMMERCIAL REAL PROPERTY IS VALUED AT ITS HIGHEST AND BEST USE. FOR TAX ASSESSMENT PURPOSES ALL

COMMERCIAL REAL PROPERTY SHOULD BE VALUED ACCORDING TO ITS HIGHEST AND BEST USE.

Casino Aztar is betting that the mantra, "value in use," if repeated often enough, will be accepted by the Court and result in a jackpot for the casino company. Casino Aztar's response to Point I of the Brief of Appellant is based on its mischaracterization of the Assessor's position. Consistently below, and now before this Court, Casino Aztar has sought to portray the Assessor's position as attempting to value the gaming license authorizing the casino on the premises along with the premises themselves.

The Assessor, however, has never sought or advocated that the gaming license, or even any contributory value that license might hold for Casino Aztar, be considered as a factor in determining the value of the property. She has, however, consistently sought to have "true value in money" to be construed to reflect the value of property at its highest and best use and to have Casino Aztar's property valued according to its highest and best use as a casino facility. Casino Aztar, itself, agrees that the highest and best use for the property is as a gaming casino, Brief of Respondents at 24, yet it believes, along with the Commission, that the property should be valued at "the next most profitable commercial activity" that could be conducted there. [L.F. 269] Under the theory advanced by Casino Aztar and the Tax Commission, no property can be valued according to its highest and best use so long as the type of business making up the highest and best use is a regulated one subject to the issuance of a license or other type of approval in order to operate.

Casino Aztar's discussion of both *Equitable Life Assurance Society v. State Tax Commission*, 852 S.W.2d 376 (Mo. App. 1993), and *City of St. Louis v. Union Quarry &*

Construction Co., 394 S.W.2d 300 (Mo. 1965), illustrates that Casino Aztar either confuses, misconstrues, or mischaracterizes the concept of highest and best use with methods of valuation. Both of those cases point out that the value of property is determined from the highest and best use of the property being valued. 852 S.W.2d at 380; 394 S.W.2d at 304-305. Casino Aztar ignores this part of the two cases and focuses, instead, on the discussions of valuation methodologies. The valuation methodology issue in *Equitable Life Assurance* was whether the income approach to valuation could or should consider actual income as opposed to market income. 852 S.W.2d at 381. As the court noted, an actual income stream being generated on income-producing property comes from four potential sources: "land, improvements, business and personal property." *Id.* When valuing the property for tax purposes by the income approach, it would not be proper to consider the income that would be derived from the business and personal property. *Id.* If actual income contains components of business income and personal property income, then actual income cannot be used in the income approach to valuation. *Id.* The important point to take from *Equitable Life Assurance* is that, even though actual income could not be used in the application of the income approach to the property, the property was still valued according to its admitted and agreed highest and best use as a hotel. *Id.* That is exactly the Assessor's position here – whatever method of valuation used to value the property should be with reference to the agreed and admitted highest and best use as a casino facility and not to the next most profitable activity that can be carried on at the property. Consistent with this position, never has the Assessor advocated that the property should be valued as a casino operated under Aztar's brand

name. Never has the Assessor advocated that the income generated by the gaming operations be considered in valuing the property by the income approach.[1]

The discussion of *Union Quarry* by Casino Aztar also focuses on the wrong issue in the opinion. Casino Aztar's focus is on the discussion relating to whether the income approach to value is the appropriate method for valuing the property, a discussion which follows and is separate from the determination that the highest and best use of the property cannot be ignored in valuing the property. 394 S.W.2d at 305-06. The discussion in *Union Quarry* which Casino Aztar highlights essentially recognizes that the property involved there was a "special use" property not readily susceptible to being valued by the comparable sales or cost approaches but particularly suitable for valuation by the income approach relying on actual income from the property. *Id.* As with *Equitable Life Assurance*, it was still necessary to value the property according to its highest and best use. *Id.*

Casino Aztar also seeks to distinguish the holding in *Union Quarry* that property must be valued with reference to its highest and best use by pointing out that *Union Quarry* is an eminent domain case, not a tax assessment case. True value in money, the

[1] With respect to the income approach, it has been the Assessor's position throughout that the property is not amenable to the income approach, not that the property should be valued considering the income generated by Casino Aztar from its casino. As Casino Aztar's witness pointed out, casino facilities are not normally leased in the market so that there is no market rents data on which to base a valuation by the income approach.

standard for tax assessments, § 137.115.1, RSMo., is the same as fair market value. *Equitable Life Assurance*, 852 S.W.2d at 380. "Fair market value [for tax assessment purposes] typically is defined as the price which the property would bring when offered for sale by a willing seller who is not obligated to sell, and purchased by a willing buyer who is not compelled to buy." *St. Joe. Mineral Corp. v. State Tax Commission*, 854 S.W.2d 526, 529 (Mo. App. 1993). Fair market value is defined no differently for condemnation purposes: "The fair market value of land is what a reasonable buyer would give who was willing but did not have to purchase, and what a seller would take who was willing but did not have to sell." *Union Quarry*, 394 S.W.2d at 305. Given the identical standards of valuation for both tax assessment and eminent domain purposes, it defies credulity to believe that if this case involved the acquisition of Casino Aztar's property by eminent domain, rather than its assessment for property tax purposes, Casino Aztar would be asking that its highest and best use as a casino be ignored so that it could be compensated at its property's "next most profitable commercial activity."

Finally, as to Point I, Casino Aztar seems to suggest that its property cannot be valued at the highest and best use as a casino because possession of a gaming license is a necessary prerequisite to operation of a casino. As pointed out in the Assesor's opening brief, however, the possession of a gaming license does not determine the highest and best use of the property – it is the demand for a particular use and the suitability of the property for that use which determines highest and best use. Substitute Brief of Appellant at 32. Casino Aztar has cited to no authority which requires a prospective casino operator to go through the entire gaming licensing process and have its license in

hand before beginning to assemble its property and construct its facility. Indeed, this was not the path taken by Casino Aztar, which invested over $12 million for land and improvements before ever seeing its license. [L.F. 118, 171-180, 236] Clearly, given its own conduct, it was the suitability of the property as a gaming facility and the potential for obtaining a gaming license which led Casino Aztar to acquire the property and invest over $12 million in improvements without benefit of a license in hand.[2]

This point is best illustrated by considering the matter in light of the definition of "true value in money" or "fair market in value": "fair market in value typically is defined as the price which the property would bring when offered for sale by a willing seller who is not obligated to sell, and purchased by a willing buyer who is not compelled to buy." *St. Joe Mineral Corp. v. State Tax Commission*, 854 S.W.2d 526, 529 (Mo. App. 1993). A willing seller who is not obligated to sell is simply not going to accept a price for its property which reflects a value based on that property's "next most profitable commercial activity." Given the undisputed evidence that the property in question has a highest and best use as a gaming facility, a willing seller who is not obligated to sell is only going to sell at a value which reflects the property's use as a gaming facility. It is not going to accept the lesser value such as a strip shopping center which reflects some lesser profitable use of the property. The Commission's decision and Casino Aztar's position

[2] The result, however, would be no different even if Casino Aztar had its license before making its multi-million dollar investment. No matter when the license was obtained and the investment was made, the highest and best use is still as a casino facility.

wholly undermine the accepted definition of "true value in money" – they are premised on the erroneous basis that a willing seller who is not obligated to sell will sell its property for a price that does not maximize its economic potential. At that price, the hypothetical willing seller would no longer be willing to sell and the value cannot, as a matter of law, reflect the true value in money or fair market value for the property.

Casino Aztar must resort to its value in use red herring to attempt to deflect the Court from the real issue as presented by the Assessor, i.e., whether a property can be valued for tax assessment purposes at a lesser economic use than its highest and best use. As the Assessor's original brief shows, it was incorrect for the Commission to value Casino Aztar's property at what it termed its "next most profitable commercial activity." [L.F. 269]

II.

(Responds to Point II of Brief of Respondents)

THE STATE TAX COMMISSION DOES NOT HAVE UNFETTERED DISCRETION IN MATTERS RELATED TO PROPERTY TAXATION AND VALUATION. IT IS BOUND TO CORRECTLY APPLY THE ACCEPTED METHODS OF VALUATION AND MUST EXERCISE ITS EXPERTISE IN ITS REVIEW OF APPEALS.

Respondents' argument under Point II of their brief is principally a factual argument by which they seek to show that the decisions of the Commission were supported by substantial and persuasive evidence. Except as noted below, the Assessor's

response to this argument is covered in its original brief under Points II and III as relates to the real property and personal property tax assessments, respectively.

The principal flaw in Aztar' argument under this point is that they believe the Commission has unfettered discretion in matters related to property taxation and valuation. Substitute Brief of Respondents at 33. As the gaming companies would have it, the Commission's discretion is so broad as to permit it to ignore legally recognized and approved methods of valuation, to re-write legal constructions of the state tax laws, and to accept blindly on faith all evidence put before it.

The Commission's authority is not so broad as Aztar would paint it. The Commission cannot deviate from the proper and recognized application of any of the four approaches to value. *See* authorities cited at Brief of Appellant at 35. The Commission has no more discretion to misapply the recognized approaches to value or to apply them to circumstances where those approaches are inapplicable, which it has clearly done here, than it does to ignore or misapply questions of law, which has also occurred.

Contrary to the gaming companies' argument and the Commission's conclusion, there was no substantial evidence in the record to support the Commission's decision. Evidence which ignored or misapplied these recognized approaches to value is not "substantial evidence," which is evidence which, if true, would have probative force on the issues and from which the trier of fact can reasonably decide the case on the fact issues. *Hermel, Inc. v. State Tax Commission,* 564 S.W.2d 888, 895 (Mo. banc 1978). The evidence presented by the gaming companies and relied on by the Commission is

neither probative nor is it such to allow the Commission to arrive at a reasonable decision of the case.

The Commission's decision also shows that it has misconstrued its role in property tax assessment appeals. The Commission's decision would suggest that it sits only as a neutral arbiter of fact that is required to pick between one side's evidence or the other. *See* L.F. 259 ("This evidence did not so establish such information upon which a value other than that proffered by Complainant's expert could be found"). The Commission, however, has a unique position, serving not as an arbiter between two sides to a dispute but as an administrative agency chartered by the constitution to ensure the uniform and correct assessment of property throughout the state. Thus, under Article X, Section 14, the Commission is created "to hear appeals from local boards in individual cases and, upon such appeal to correct any assessment which is shown to be unlawful, unfair, arbitrary or capricious." Mo. Const. Art. X, § 14. Because of the complexity of the tax laws, the Commission was created specifically to apply its expertise to tax assessments and to see that the tax laws were being uniformly applied across the state. *State ex rel. Cassily v. Riney*, 576 S.W.2d 325, 328 (Mo. banc 1979)("We are aware of the complexities of the property tax law and acknowledge the wisdom of the General Assembly in providing an administrative agency to deal with the specialized field" and "We are convinced that the public interest requires that the 'experts' be given an opportunity to attempt to resolve the difficult problems presented in this case").

Thus, the Commission has an affirmative obligation to apply its expertise, to not merely choose between the evidence proferred by the parties and to reject evidence which

does not comport with the recognized methods of valuation. Recognizing this affirmative obligation, this Court stated in *St. Louis County v. State Tax Commission*, 515 S.W.2d 446, 450 (Mo. 1974), that the Commission "does not have the privilege enjoyed by common law juries deliberating on damages in a negligence suit to reach up in thin air and pick a figure somewhere within the limits of the evidence, without any burden of giving a rational explanation." The Commission exists to protect the integrity of the tax assessment system by seeing that assessments are based on the proper application of the legally recognized methods of valuation. Clearly, in this instance, the Commission abrogated its responsibility. Having done so, it has abused any discretion it might exercise in the course of such an appeal.

III.

(Responds to Point III of Brief of Respondents)

IN VALUING CASINOS AT THEIR NEXT MOST PROFITABLE HIGHEST AND BEST USE WHILE VALUING ALL OTHER COMMERCIAL REAL PROPERTIES AT THEIR HIGHEST AND BEST USE, THE STATE TAX COMMISSION HAS CREATED A SUB-CLASSIFICATION OF COMMERICAL REAL PROPERTY IN VIOLATION OF ARTICLE X, SECTION 4(B). ITS ACTION GOES BEYOND APPLYING DIFFERENT FACTORS TO PROPERTIES WHICH ARE DIFFERENT IN NATURE IN THE APPLICATION OF ANY OF THE RECOGNIZED APPROACHES TO VALUATION.

Casino Aztar's argument on the constitutional issue again misses the point of the Assessor's argument and again stakes its position on its "value in use" red herring. Brief

of Respondents at 50. The Assessor is not advocating a value in use valuation of Casino Aztar's property; she is not seeking to have the gaming license of Casino Aztar included in the value of the company's real property; and she is not arguing that a separate sub-classification of commercial real property is created because the value of the gaming license to the real property was not one of the factors considered by the Commission in valuing the property. With respect to her claim under Article X, Section 4(b), her position is that the Commission has created a sub-classification of commercial real property by the adoption of its policy of valuing non-casino commercial real property at its highest and best use while valuing casino commercial real property at its "next most profitable commercial activity." [L.F. 269]

The crux of Casino Aztar's argument is that the Commission's decision did no more than recognize distinctions in factors which impacted the value of casino properties that did not impact the value of non-casino properties. This is not, however, what the Commission did in its decision, as is seen from the cases which Casino Aztar cites in its argument. Significantly, none of those cases relate to either Article X, Section 4(b), or the true issue of whether one sub-set of commercial real property can be can be valued at its next most profitable highest and best use while all other commercial real property is valued at its highest and best use.

Casino Aztar first cites to *Missouri Baptist Children's Home v. State Tax Commission*, 867 S.W.2d 510, 513 (Mo. banc 1993), and quotes the language, "Merely because a factor exists which impacts on the value of one piece of property that does not affect every other piece of property in the same class is not a basis for violation of the

uniformity clause." As this language makes clear, *Missouri Baptist Children's Home* was concerned with the uniformity clause found in Article X, Section III, not the prohibition against further sub-classification of commercial real property found in Article X, Section 4(b). Further, the quoted language has to be analyzed from the standpoint of its use in the case. The Court was talking about the consideration of factors relating to the subject property in the application of one of the recognized methods of valuation. 867 S.W.2d at 513. In *Missouri Baptist Children's Home*, the issue was solely whether the uniformity clause was violated because actual rents were used for the income approach for properties subject to long-term leases while market rents were used for the income approach for other income producing properties. *Id.* In contrast, this case does not involve the consideration of differences in factors that might be considered or applied in any one of the legally recognized approaches to value. It involves the completely different issue of whether some properties, regardless of the approach to valuation utilized, can be valued at their highest and best use while others are valued at something less than highest and best use.

O'Flaherty v. State Tax Commission, 698 S.W.2d 2, 3 (Mo. banc 1985), is cited for the proposition that "factors such as supply and demand can be taken into account when ascertaining the true value in money of property without violating Art. X, § 4(a)." Substitute Brief of Respondents at 51. While Article X, Section 4(a) does have language relating to creating subclasses for tangible <u>personal</u> property, *O'Flaherty* was not concerned with the issue of whether a sub-classification of property had occurred. The issue there was whether surplus inventory could be valued at a lesser amount than similar

items of property which were not surplus. *Id.* Article X, Section 4(a) was invoked, not for any limitation on sub-classification, but with respect to language in the provision which suggested that valuation of the property was to be based solely on the nature and characteristics of the property and not on the nature of the business of the owner. *Id.*

If *O'Flaherty* was a sub-classification case, it would support the Assessor's position and not that of Casino Aztar and the Commission. The case would suggest that a sub-classification occurs when the valuation is based on the nature and character of the business of the owner, rather than the nature and characteristics of the property. This is exactly the position of the Assessor on this issue – the Commission has adopted a policy which values casino properties at something less than their highest and best use based on the fact that they are casinos, while valuing all other commercial properties on the nature and characteristics of the property as reflected in their highest and best use.

C&D Investments Co. v. Bestor, 624 S.W.2d 835, 838 (Mo. banc 1981), is a tax discrimination/equalization case. *Id.* at 837. In that case, the assessor applied his own "equalization factor" of 54% to improvements (but not land) across the board to newly constructed and reassessed properties. *Id.* The net effect of the application of the equalization factor was to create tax uniformity, rather than differences in tax burdens, between those with newer properties to which the equalization factor was applied and those who owned older properties. *Id.* The prohibition against sub-classifying real property found in Article X, Section 4(a), was not violated even though the equalization factor was applied only to improvements because the practice had the effect of equalizing the tax burdens among owners of real property. *Id.*

Cupples Hesse Corporation v. State Tax Commission, 329 S.W.2d 696 (Mo. 1959), is likewise a discrimination/equalization case brought under Article X, Section 3 of the Constitution and was concerned only with uniformity of taxation. *Id.* at 698, 699-700. Other than passing mention of Article X, Section 4(a), the case does not address any sub-classification of any sort, whether it is a sub-classification prohibited under Article X, Section 4(b) or one prohibited under Article X, Section 4(a). Similarly, *Equitable Life Assurance Society v. State Tax Commission*, 852 S.W.2d 376 (Mo. App. 1993), involved a challenge under the uniformity clause, Article X, Section 3. *Id.* at 382-83. There was no issue of the creation of a sub-classification under either Article X, Section 4(a) or Article X, Section 4(b). *Stephen and Stephen Properties, Inc. v. State Tax Commission*, 499 S.W.2d 798 (Mo. 1973), involved no constitutional challenge, whether based on sub-classification or uniformity.

NCR Corp. v. State Tax Commission, 637 S.W.2d 44 (Mo. App. 1982), involved challenges to a personal property assessment based on Article X, Section 3 (the uniformity clause) and Article X, Section 4(a). *Id.* at 48. Leased business machines and computers were valued using a gross rent multiplier while owned business machines and computers were valued using a replacement cost approach. With respect to the Article X, Section 4(a) challenge, the issue concerned whether these different approaches to value for business machines and computers created an impermissible sub-classification of personal property and, thereby, violated that part of the constitutional provision which allowed the general assembly to provide for further sub-classification of personal property "based solely on the nature and characteristics of the property, and not on the

nature, residence or business of the owner, or the amount owned." Mo. Const. Art. X, § 4(a). As the court noted, distinguishing between these properties did not involve an "improper discrimination or sub-classification of property," 637 S.W.2d at 49, i.e., the different methods of valuation were based on the nature and characteristics of the property (leased equipment versus owned equipment) and not on the nature of the owner.

In contrast to *NCR Corp*., this case does not involve the issue of whether a permissible sub-classification under the constitution has occurred, as Article X, Section 4(b) prohibits any further sub-classification of commercial real property. Mo. Const. Art. X, § 4(b). Significantly, Casino Aztar does not address the holding of *Drey v. State Tax Commission*, 345 S.W.2d 228, 236-37 (Mo. 1961), which did concern an outright prohibition against further sub-classification of real property found in Article X, Section 4(a). As noted in the Appellant's brief, this case involves the same type of practice deemed a sub-classification of property in *Drey*. Substitute Brief of Appellant at 51. Once it is determined that a sub-classification of commercial real property has occurred, a violation of Article X, Section 4(b) has occurred without any need to further consider whether the sub-classification is permitted.

CONCLUSION

The judgment of the circuit court affirming the decisions of the State Tax Commission should be reversed and the cause remanded to the circuit court with directions that the circuit remand the case to the State Tax Commission to redetermination of the value of the subject properties for the taxable years in question consistent with this opinion.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: _____

Thomas W. Rynard, #34562
308 East High Street
Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358

SOKOLOFF & SPIELMAN
Stephen P. Sokoloff, #28203
P.O. Box 721
Kennett, Missouri 63857
Telephone No.: (573) 888-6610
Facsimile No.: (573) 888-6677

CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 5025 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 1/2" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____

Thomas W. Rynard

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellants and a 3 ½" disk containing the same were sent U.S. Mail, postage prepaid, on this 14th day of October, 2004, to Thomas Caradonna, Lewis, Rice & Fingersh, LLC, 500 North Broadway, Suite 2000, St. Louis, MO 63102, and and Edward Reeves, Ward & Reeves, 711 Ward Avenue, P.O. Box 169, Caruthersville, Missouri 63830, Attorneys for Respondents.

_____

Counsel for Appellants